

No. 10,359

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FLOTATION SYSTEMS, INC. (a corporation), and UNITED STATES FIDELITY AND GUARANTY COMPANY (a corporation),
Appellants,

VS.

UNITED STATES for use of ANDREW POL-LIA, T. G. SHANNON and B. W. MACKIE, co-partners doing business under the fictitious name and style of Shanmac Co.,
Appellees.

APPELLANTS' OPENING BRIEF.

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Appellees.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL FACTS.

This is a suit in the name of the United States for the use of Andrew Pollia, as sub-contractor against the Flotation Systems, Inc., a corporation, general contractor, and United States Fidelity Company, a corporation, sureties on the bond of Flotation Systems, Inc.

Flotation Systems, Inc., were the general contractors for the United States in the installation of a certain

gasoline distribution system at Alameda, in the State of California, and as such general contractor entered into a sub-contract with Andrew Pollia.

The jurisdiction of the District Court to hear and decide this case is under Title 40, U. S. C. A.,

Sec. 270a, enacted Aug. 24, 1935, c. 642,

Sec. 1, 49 Stat. 793, and

Sec. 270b, enacted Aug. 24, 1935, c. 642,

Sec. 2, 49 Stat. 794, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE AND PLEADINGS.

Flotation Systems, Inc., were the general contractors for the installation of the gasoline distribution system at the Naval Air Base in Alameda, California. As such general contractors, it entered into a sub-contract with Andrew Pollia for the installation of the gasoline and water pipes as shown on the plans and specifications of the contract between Flotation Systems, Inc., and the Naval Department of the United States.

As the work progressed certain changes were made by the naval authorities and Andrew Pollia as sub-contractor was given extra work orders for the doing of this extra work. After the work had progressed for some time, a question arose as to the interpretation of the contract between the parties. Andrew Pollia claimed that under the contract he was not required to do any work in the pits and Flotation Systems, Inc., claimed that all work shown in the plans and specifications had to be performed by Pollia under his contract.

This action was filed by Andrew Pollia on the 21st day of June, 1941. (R. 2.) A bill of particulars was demanded of and furnished by Andrew A. Pollia and filed on the 1st day of August, 1941. (R. 6.) The answer of Flotation Systems, Inc., was filed on August 8th, 1941. (R. 8.) On September 29th, 1941, T. G. Shannon & B. W. Mackie, copartners doing business under the fictitious name and style of Shanmac Co., were granted leave to intervene. (R. 16.) Complaint in intervention was filed September 29th, 1941. (R. 12.) Flotation Systems, Inc., answer to complaint in intervention was filed October 8th, 1941 (R. 23), and the cause was heard before the Court, Honorable Frank H. Norcross, presiding, February 17th, 18th and 20th.

On June 12th, 1942, the Court filed its memorandum decision. (R. 26.) Findings were filed on the 1st day of July, 1942 (R. 28), and judgment entered on the 1st day of July, 1942. (R. 38.) Motion for a new trial was duly and regularly made within the time provided for which motion was by the Court denied and this appeal was thereupon timely taken.

Appellants were the general contractors for the installation of the gasoline distribution system at the Naval Air Base in Alameda, California. Appellants entered into a subcontract with Andrew A. Pollia, for the installation of the gasoline and water pipes as shown on the plans and specifications of the contract between appellants and the United States.

Appellants' main office was in Los Angeles. One, Eugene Ceriat, the employee of appellants, was in

charge of the work at the Naval Air Base at Alameda. Ceriat and Pollia had certain negotiations which culminated in Pollia proposing to do certain work under a subcontract. Ceriat wrote to appellants in Los Angeles, stating what Pollia proposed to do. This letter was offered in evidence and marked plaintiffs' "Exhibit 1". (R. 110.)

On receipt of this letter appellants notified Ceriat to have Pollia draw up a contract, which Pollia did, and thereafter it was executed by the parties. The contract was admitted in evidence, marked plaintiffs' "Exhibit 2", and is in the words and figures following:

"May 28, 1940

Re: Gasoline Storage and Distribution and Distribution System Naval Air Station, Alameda, Calif. Specification No. 9505.

Flotation Systems, Inc.,
4031 Goodwin Avenue
Los Angeles, California

Gentlemen:

For the sum of Sixteen Thousand and Forty Dollars, (\$16,040.00), I propose to furnish the following labor and material, all in strict accordance with Bureau of Yards and Docks Specification 9505:

Item 1: Complete installation of all gasoline pipe line as covered by plans accompanying Spec. 9505, including necessary excavation, backfill, replacement of red rock surfacing, repairs to any existing roads, welding and testing all joints, and all connections to Pit Boxes A (1), B (1), C-2 (2), D (8), and E (16). It is understood that Flotation Systems, Inc. will furnish all necessary

pipe and fittings, and I will furnish all welding materials and equipment.

Item 2: Complete installation of all Cast Iron U. S. Joint Water lines as covered by plans accompanying Spec. 9505, including necessary excavation, backfill, replacement of red rock surfacing, repairs to any existing roads, connection and testing of all joints, and all connections to Pit Boxes A (1), B (1), C-2 (2), D (8), and E (16). It is understood that Flotation Systems, Inc. will furnish all pipe, fittings, follower rings, and gaskets, and that I will furnish the 10" rock base under the pipe lines in the trench.

Item 3: Complete installation of a 12" terra-cotta drain pipe, to be installed in lieu of the 8" drain line as covered by the plans accompanying Spec. 9505, and including necessary excavation, backfill, replacement of red rock surfacing, repairs to any existing roads, connection of joints, and all connections to Pit Boxes C-2 (2) and D (8). It is understood that I will furnish the 12" terra-cotta pipe, all fittings required and the 10" rock fill under pipe in trenches. It is further understood that in the event any excavating below a depth of six feet is required on this line, I will receive \$1.60 per cubic yard of excavation done below this depth, in addition to the amount stipulated above.

Item 4: Painting of all piping installed by us inside of pit boxes A, B, C, D, and E.

I agree to wrap all joints and fittings installed under Item 1, above, for the following prices, to be paid in addition to the amount stipulated above:

6" joints and fittings @\$2.10 each
 5" joints and fittings @ 1.70 each
 4" joints and fittings @ 1.40 each
 3" joints and fittings @ 1.10 each

I agree to begin work within three days (holidays excluded) after acceptance of this agreement, and to complete all work after acceptance of this agreement, and to complete all work covered by this agreement within forty-five (45) days after acceptance of this agreement; and that in the event of my failure to do so, Flotation Systems, Inc., will have the right to proceed with the work and charge the cost of completing same against the amount stipulated in this agreement.

Terms are to be payments monthly on the basis of 90% of the work completed, and the balance of 10% to be paid upon completion of work.

Respectfully yours,

Andrew A. Pollia.

Accepted by Eugene Ceriat.

Date 5-28-40."

POINTS ON APPEAL.

1. Erroneous interpretation of the contract materially affecting the rights of the parties.
2. The evidence is insufficient to support the findings or the judgment.

ARGUMENT.

First Point: Erroneous interpretation of the contract materially affecting the rights of the parties:

It is the contention of the appellants that the Court misconstrued the contract. In its memorandum decision set forth in the record, page 27, the Court held that the expression used in the contract "to pit boxes" applied to the installation of piping and fitting in the pit boxes as well as welding and testing all joints to pit boxes.

Item 1 and Item 2 of the contract are identical, except that Item 1 applies to the installation of gasoline pipe lines and Item 2 applies to the installation of cast iron water lines. In Item 1, Pollia proposes to furnish the labor and material for the "Complete installation of all gasoline pipe line as covered by plans accompanying Spec. 9505". In addition thereto the item continues, "including necessary excavations, backfill, replacement of red rock, surfacing, repairs to any existing roads, welding and testing all joints and all connections to pit boxes". Pollia contends that under this wording of the contract he was not required to install any pipes or fittings in the pit boxes even though they were shown on the plans accompanying the specifications.

Appellants claims that the correspondence between the parties, prior to the entering into the contract shows that it was the intention of the parties that Pollia would perform all the work of installing the piping and fittings in the pit boxes.

The first clause of Item 1 of the contract provides for "complete installation of all gasoline pipe line as covered by plans accompanying Spec. 9505". If the contract had stopped there, I do not think there could

have been any question that all of the piping shown on the plans, whether inside or outside of the pits, would have had to have been installed by Pollia. The word "including" must, under a proper interpretation of the contract, be inserted before each of the provisions following, that is, the word "including" provides for other and additional work and does not pertain to the installation, but only to welding and testing all joints and all connections to pit boxes.

Proper construction of those clauses of the contract would be as follows:

- Including all necessary excavation;
- Including backfill;
- Including replacement of red rock;
- Including surfacing;
- Including repairs to existing roads;
- Including welding, and testing all joints, and all connections to pit boxes.

The expression "to pit boxes" applies only to the welding and testing of joints and does not apply to the installation thereof.

Pollia testified (R. 53) that he saw the original plans and specifications, and also that he checked the original plans and specifications (R. 117) before submitting a bid.

As the work progressed and changes were made which entailed extra work, before doing or performing the work caused by these changes, Pollia demanded an extra work order. He never demanded an extra work order for the installation of the piping and fittings installed by him in the pits shown on the original

plans and specifications and had performed 80% of the installation of the piping and fittings inside the pits before he raised any question as to whether or not this work was in the contract. (Testimony of Snyder, R. 136 and 137.)

These two facts are significant,

First: That no extra work order was ever demanded by Pollia for the doing of work inside the pits;

Second: That he had performed 80% of said work before raising any question about it. (R. 137.)

The last item in the bill of particulars is four thousand nine hundred three and 20/100 (\$4903.20) dollars, predicated upon the letter dated August 23rd, 1940. This letter was admitted in evidence marked plaintiffs' "Exhibit 10", and is in the words and figures following, to-wit:

"P. O. Box 416
Alameda, California
August 23, 1940

Andrew A. Pollia
San Francisco, California

Dear Mr. Pollia:

In regard to agreement entered into May 28th, 1940 for certain pipe laying and plumbing work in conjunction with Contract NOy-3850 at the Naval Air Station, Alameda, California, you are authorized to proceed as instructed by us with any additional work necessary to complete the pit piping, but not covered by the original plans and specifications. For any such work not covered by above agreement and not shown in the plans and specifications at the time the agreement

was entered into, you are to receive payment on the basis of the following unit prices, and the quantities involved are to be determined by inventory at the end of the job:

Bolting up 4" Flange Joints..	\$2.50	each
" " 6" " " ..	3.75	"
" " 21½" " " ..	1.50	"
4" Pipe Welds	1.75	"
5" " "	2.40	"
6" " "	3.60	"
11½" " "	1.05	"
Installing 4" Valves.....	6.50	"
Installing 6" Valves.....	13.50	"
Patch Wrapping on Pipe Lines	1.10	per foot

This authorization *does not* supercede that covered by our letter of August 7, 1940, and the above prices on welding apply only to welds that must be made in place, inside the pits. On any welding that can be done at the bench, the price of \$0.04 per inch applies.

Very truly yours,

Flotation Systems, Inc.

By A. S.

Arthur T. Snyder, Engineer.

ATs-

cc-L.A. Office."

It is the contention of Pollia that this letter is an authorization by Flotation Systems, Inc., for him to do all of the work of the installation of piping and fittings inside of the pits even though most of that work was shown on the original plans and specifications and even though he had performed 80% of this work prior to August 23rd, 1940.

It is his claim that this letter was an extra work order for the doing of this work as under his interpretation of the contract he was only to lay the pipes up to the pits and not in the pits.

Pollia's own testimony (R. 75) is a direct contradiction of this contention. This letter specifically exempts or excludes any work or piping shown on the original plans and specifications and was issued to cover only extra work caused by changes in the original plans.

That Pollia clearly understood that this letter was for the doing of extra work not shown on the original plans is shown by his testimony (R. 75), wherein he testified that this letter was given to him to cover extra work inside of the pits on a unit basis. It is quite evident therefore, that from the time of entering into the contract, to-wit, May 28th, 1940, up until the date of this letter, August 23rd, 1940, that Pollia interpreted the contract to mean that he had to perform the work shown on the plans and specifications inside of the pits as well as outside. It was only after he received this letter of August 28th, 1940, that any question was raised as to the interpretation of the meaning of the expression in the contract *to pit boxes*, and that Pollia up until August 23rd, 1940, interpreted the contract to mean that he should install all the piping and fittings as shown on the plans and specifications in accordance with the first paragraph of the contract which provides,

“For the sum of \$16040.00, I propose to furnish the following labor and materials, all in strict

accordance with the Bureau of Yards and Docks Spec. 9505”

“Item 1: Complete installation of all gasoline pine line as covered by plans accompanying Spec. 9505.”

It therefore follows that from the time Pollia drew up the contract on May 28th, 1940, to the 23rd of August, 1940, it was his understanding that under the contract he was required to install all pipe and fittings in pits shown on original plans and specifications and therefore, the Court's interpretation of the contract, that Pollia was not required to install the pipe and fittings in the pits, shown on the plans and specifications, is contrary to the intention of the parties and an erroneous interpretation.

Second Point: The evidence is insufficient to support the findings or the judgment:

The testimony of Andrew A. Pollia, the plaintiff, was very indefinite and he does not even attempt to justify the items of his bill of particulars. On the other hand the testimony of Arthur F. Snyder, commencing on page 139, of the record, shows that he kept complete records and detailed accounts of the work done by Pollia, and from his records he testified in detail as to each and every item of the bill of particulars:

Proper
Charge

“Item 1—In the Bill of Particulars is an extra work order, Plaintiffs’ ‘Exhibit 9’, it is a letter dated August 7, 1940, and the pertinent part thereof is as follows: You are authorized to proceed with the following extra work in addition to that covered by our contract agreement dated May 28th, at the unit prices shown below:

Wrap approximately 269-6” joints and fittings at \$2.10.

Wrap approximately 5-5” joints and fittings at \$1.70.

Wrap approximately 46-4” joints and fittings at \$1.40.

Wrap approximately 18-3” joints and fittings at \$1.10.

269-6” @ \$2.10.....	\$564.90
5-5” @ \$1.70.....	8.50
46-4” @ \$1.40.....	64.40
18-3” @ \$1.10.....	19.80

Total.....\$657.60

Item 1 of the Bill of Particulars makes a charge of \$663.60; it should be.... \$657.60

Item 2—No joints were welded other than those covered in the contract and these especially authorized by extra work orders which orders were admitted in evidence. This item two of the Bill of Particulars does not appear in any of the work orders, it should be eliminated (R. 139).

	Proper Charge
Item 3—In item 3, the testimony was that the amount agreed upon between Mr. Pollia and Mr. Snyder was 20½ hours at \$7.50 per hour, making a total of \$143.50, instead of \$164.00 (R. 140)	143.50
Item 4—The same agreement was entered into. Mr. Snyder's record showed that there was 50½ hours at \$7.50 per hour which would make a total of \$353.50 instead of \$404.00 (R. 140)..	353.50
Items 5 and 6—Snyder's testimony (R. 141) shows that all pipe except that in Item 7, of the Bill of Particulars, was wrapped by the Non Corrosive Products Company and delivered to Pollia in a perfect condition. Any damage to the wrapping that might require patching was due to the careless manner in which the pipe was handled by Mr. Pollia and no order for the doing of this was demanded or obtained by Pollia and should be eliminated. And it is to be noted that under Item 7, of the Bill of Particulars, which was extra that Mr. Pollia required a work order for this, which authorization was contained in the letter of August 23rd, 1940, and amounts only to \$36.00. These two items 5 and 6 in the Bill of Particulars were not extra and no orders were ever obtained for the doing of any of this work. It seems strange	

Proper
Charge

that Mr. Pollia would obtain an extra work order for the doing of \$36.00 worth of work and did not obtain an extra work order for the doing of work charged in Items 5 and 6 amounting to \$2145.00. Further, all pipe and joint wrapping done on the job was done by A. R. Reed & Co., and his total bill for labor and material for this was \$487.52. (R. 143.)

Item 7—Is correct. That was for wrapping 120 feet of 4" pipe at 30¢ a foot	36.00
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Item 8—Clearly was a part of Mr. Pollia's contract. The pipe was distributed by the carrier beside the trenches where it was to be installed (R. 144), and no mention was ever made by Mr. Pollia to the effect that the distribution of this pipe was not part of his contract and this item should be eliminated.

Item 9—Should be eliminated as this was part of the testing which Pollia agreed to do in the contract.

Item 10—Should be eliminated as this is part of the testing.

Item 11—Should be eliminated as this is part of the contract. The pipe cannot be installed unless it is cut and fitted.

	Proper Charge
Item 12—Mr. Snyder testified that Polia told him the amount due for the use of the Civil Engineer was the sum of \$4.35	4.35
Item 13—Is correct and was covered under the extra work order No. 1215	242.00
Item 14—Item 14 of the Bill of Particulars is extra work as ordered by work orders 273 and 274. These two orders applied to the same work. (R. 149.) This work applied to the installation of equipment in ten (10) fueling pits which were not in the original contract; they were known as Pits 'F'. There were ten fueling pits at the price of \$77.00 per pit, but by reason of the fact that equipment was not available there were two hose reels in each pit which were not installed by Polia. Cost of installing these was \$10.00 a hose reel which would make a deduction of \$200.00. This charge instead of \$770.00 should be \$570.00 (R. 150)....	570.00
Item 15—is correct.....	165.00
Item 16—is correct.....	208.00
Item 17—The letter dated August 23rd, mentioned in the Bill of Particulars, Plaintiffs' 'Exhibit 10' (R. 76), is as follows: 'In regard to agreement entered into May 28th, 1940, for certain pipe laying and plumbing work in conjunction with Contract No. t-3850 at the Naval Air	

Station, Alameda, California, you are authorized to proceed as instructed by us with any additional work necessary to complete the pit piping, but not covered by the original plans and specifications. For any such work not covered by above agreement and not shown in the plans and specifications at the time the agreement was entered into, you are to receive payment on the basis of the following unit prices and the quantities involved are to be determined by inventory at the end of the job.

Belting up 4" Flange Joints	\$2.50	each
" " 6" " "	\$3.75	"
" " 2 1/2" " "	\$1.50	"
4" Pipe Welds.....	\$1.75	"
5" " " 	\$2.40	"
6" " " 	\$3.60	"
1 1/2" " " 	\$1.05	"
Installing 4" Valves.....	\$6.50	"
" 6" " 	\$13.50	"

Patch Wrapping on Pipe

Lines (per foot)..... \$1.10

This authorization does not supersede that covered by our letter of August 7, 1940, and the above prices on welding apply only to welds that must be made in place, inside the pits. On any welding that can be done at the bench, the price of \$0.04 per inch applies."

Mr. Snyder testified that he kept a detailed record of all the work and of all changes from original

plans and specifications and all additional work caused by such changes and from these records he testified in full as to the amount of extras to which Pollia was entitled under and pursuant to the letter of August 23, and that amount was the sum of \$269.73. (R. 151 and 152.)

In this connection there is an error in computation in the record as follows:

“Now the amount of welded flanges for the storage tanks 32-6” bench welds at 88¢ each, the record says a total of \$128.16.” This figure is incorrect, it should be \$28.16, as 32 welds at 88¢ each, total \$28.16.

Pollia’s testimony with reference to this work is found in R. 75 and 76, and the only mention of work done by him under and pursuant to this letter is bolting up 4” flange joints at \$2.50 apiece. (R. 75 and 76.) Pollia said he did that extra work. Mr. Snyder’s testimony above referred to set forth in detail what was done under the letter of August 23rd, or plaintiffs’ “Exhibit 10”, the charge in the Bill of Particulars for this is \$4903.20.

There is no testimony in the record save and except the above referred to as to what constitutes this charge. The proper amount for this should be \$269.73.... \$269.73

The balance, to-wit, of four thousand six hundred forty-three and 47/100 (\$4643.47) dollars, in Item 17,

of the Bill of Particulars, is a charge by Pollia for the doing of the work in the pits shown on the plans and specifications. Pollia claims that the letter of August 23rd, 1940, plaintiffs' "Exhibit 10", was an authorization for the doing of this work.

This letter specifically exempts or excludes any work or piping shown on the original plans and specifications and it was issued to cover only extra work. That Pollia clearly understood that the letter was for the doing of extra work is shown by his testimony (R. 75) when he testified that this letter was issued to cover extra work inside of the pits on a unit basis. That certain work inside of the pits was being done by the Aqua Systems and that it required bolting up of the valves where the Aqua Systems terminated their work. That all of this work was shown on the plans and specifications and Pollia knew that it was on the plans and specifications is borne out by his testimony (R. 300 and 301):

"Q. Coming to your letter of August 29th, complete work in pits A, B, C, D, and E.

A. Yes.

Q. Was the work done by you as shown in your statement shown on the plans and specifications?

A. Was the work done by me?

Q. Yes. I am not trying to mislead you. You actually did that work?

A. Yes, I did that work.

Q. Now was that shown on the plans and specifications or on that blue print?

A. That was shown on these plans."

It is quite evident that Pollia knew that there was considerable piping and fitting to be installed in the pits and also that this letter of August 23rd, was an authorization for the installation of extra work caused by changes in the plans, and therefore could not be an authorization for the doing of the work in the pits shown on the plans and specifications.

COUNTER CLAIMS AND OFFSETS.

Appellants, Flotation Systems, Inc., pleaded in its answer offsets and counterclaims amounting to the sum of two thousand one hundred seventy-one and 30/100 (\$2171.30) dollars. These offsets and counterclaims were itemized and attached to the answer as "Exhibits B and C". (R. 14 and 15.)

There is an error in the record with reference to the total amount of items set forth in "Exhibit C". The record set forth the amount of one thousand three hundred sixty-five and 58/100 (\$1365.58) dollars, but the correct figure should be one thousand four hundred sixty-five and 58/100 (\$1465.58) dollars.

The items set forth in "Exhibit C" of the answer are bills for labor and material contracted for by plaintiff Pollia, and these bills not having been paid, demand was made upon Flotation Systems, Inc., for the amount thereof and subsequently the payment of these accounts was authorized by Pollia, testimony of Tamba (R. 101 and 105), and in the trial of the

action plaintiff did not dispute the correctness of these bills so paid by Flotation Systems, Inc., appellants herein.

With respect to the items set forth in "Exhibit B", totaling seven hundred five and 72/100 (\$705.72) Dollars, Arthur Snyder testified as to the correctness of these amounts and the payment thereof by Flotation Systems, Inc. (R. 211, 212, 213, 214 and 215.) There was no contradiction or refutation of this testimony by the plaintiff and therefore the correctness of the amounts and the payment thereof by Flotation Systems, Inc., was admitted by plaintiff Pollia.

Neither the findings nor the judgment contained any reference to these admitted offsets and counter-claims.

A recapitulation of the amounts and admitted offsets is as follows:

"Offsets and credits due from Pollia
to Flotation Systems:

'Exhibit B'	\$ 705.72
'Exhibit C'	1,465.58

Total	<u>\$2,171.30</u>
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Contract	\$16,040.00
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Extras	2,649.68
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Total	<u>\$18,689.68</u>
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Payments	17,272.04
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Balance due Pollia	<u>\$1,417.64</u>
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Over payment to Pollia....	\$ 753.66"
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We submit that the Court's interpretation of the contract is erroneous and that the finding that plaintiff is entitled to judgment as prayed for is wholly unsupported by the evidence and that for the reasons herein set out, judgment must be reversed.

Dated, San Francisco,
April 12, 1943.

JOHN D. HARLOE,
Attorney for Appellants.